

The Honorable Brian D. Lynch
Chapter 13
Hearing Location: Telephonic
Hearing Date: December 16, 2020
Hearing Time: 01:30 P.M.
Response Date: December 02, 2020

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON - TACOMA DIVISION

In Re:) Case No.: 20-42304-BDL
Jacarae Lea Fairbanks,) CHAPTER 13
Debtor.) **MOTION FOR RETROACTIVE
ANNULMENT OF THE AUTOMATIC
STAY AND VALIDATION OF
EXECUTION, DELIVERY AND
RECORDING OF TRUSTEE'S DEED**

Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit Opportunities Trust V-C ("Wilmington"), its successors and/or assignees (collectively referred to as "Movant") moves the Court pursuant to 11 USC §362(d)(1) for an Order for Retroactive Annulment of the Automatic Stay and Validation of the Execution, Delivery and Recording of the Trustee's Deed Upon Sale.

I. RELEVANT FACTS

A. The Property

On or about November 29, 2006, Jacarae Lea Fairbanks executed a note in favor of Capital Six Funding, an Operating Series of Mandalay Mortgage LLC., A Delaware Limited Liability Company in the original principal amount of \$220,000.00 ("Note"). The debt

1 described by the Note was secured by a deed of trust ("Deed of Trust") properly recorded and
2 creating a lien against property commonly described as 18610 85th Avenue East, Puyallup,
3 Washington 98375 (the "Property").

4 The debtor fell behind on her payments and was due for the October 1, 2015 payment.
5 In February of 2017, Debtor obtain a Loan Modification which lowered the interest rate and
6 changed her principal and interest payment. **A new first payment due date was set for**
7 **April 1, 2017.** She made three payments and then defaulted.

8 **B. The Foreclosure Efforts**

9 On or about March 25, 2019, a Notice of Trustee's Sale was recorded as Auditors
10 #201903250255. On September 26, 2019, the Debtor executed a Loan Modification
11 Agreement with Trial Payment Plan Provision. The agreement included 12 trial plan payments
12 of \$2,139.05. In its terms, the Debtor agreed: "Upon receipt of this fully executed agreement
13 and the funds outlined below, the lender agrees to place the foreclosure on hold. Consumer
14 understands, as a condition of entering into this Loan Modification, that there will be a
15 Twelve (12) consecutive month trial period, beginning 9/1/19 and ending 8/1/20. **During this**
16 **Trial Payment Plan the Consumer understands that the loan will remain in foreclosure.**
17 **If Consumer fails to make a monthly payment or exceeds a delinquency of Thirty (30)**
18 **days or more, Consumer agrees to stipulate to Foreclosure and waives their right to all**
19 **defenses upon default of the New Loan Modification Agreement."**

20 The Debtor failed to make the February 2020, March 2020, and April 2020 trial plan
21 payments. As a result of Debtor's default on the trial plan payments, Movant proceeded with
22 the foreclosure. On May 21, 2020, the State of Washington Department of Commerce issued
23 a Referral for Foreclosure Mediation Notice pursuant to RCW 61.24.163(3). Movant
24 participated fully and on July 15, 2020, issued a denial letter based upon insufficient income.

25 On or about August 5, 2020, the assigned Mediator issued a certificate finding bad
26 faith on part of the Debtor for failing to supply all statutory required documents after an
27 extension of time was granted to the Debtor to provide such documents.

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1 On October 2, 2020, the foreclosure sale went forward. The Property was sold to a
2 bona-fide third party purchaser, Ladder Properties LLC and Eastside Funding LLC for
3 Security Purposes Only for \$353,100.00. There are surplus funds from the sale.

4 As set forth in the Declaration of Michelle Ghidotti, Movant's Foreclosure Trustee,
5 filed concurrently herewith, general notice of this bankruptcy petition was provided by
6 Debtor's Counsel on October 9, 2020. The notice failed to mention the sale date or status.
7 Out of the state and away from the office, Ms. Ghidotti acknowledged receipt of the notice.
8 Then, upon her return to the office on October 12, 2020, Ms. Ghidotti executed the already
9 prepared Trustee's Deed Upon Sale ("TDUS") waiting on her desk without realizing that it
10 related to the October 9th email sent by Debtor's Counsel. The third party purchaser
11 subsequently recorded the TDUS on October 15, 2020 as Auditors #202010150413.

12 II. ARGUMENT AND AUTHORITY

13 A. Standing

14 Any "party in interest" may seek relief from stay. 11 U.S.C. § 362(d). A "party in
15 interest" may include "any party that has a pecuniary interest in the matter, that has a practical
16 stake in the resolution of the matter or that is impacted by the automatic stay." *In re Cruz*, 516
17 B.R. 594, 602 (9th Cir. BAP 2014) (citing *Brown v. Sobczak (In re Sobczak)*, 369 B.R. 512,
18 517–18 (9th Cir. BAP 2007)).

19 B. The Sale Occurred Pre-Petition And The Trustee Deed Upon Sale Was 20 Recorded Within 15 Days From The Sale Date.

21 Under the Washington Deed of Trust Act, a nonjudicial sale is final if a bid is
22 accepted and the trustee's deed is properly recorded. The Deed of Trust Act provides:

23 When delivered to the purchaser, the trustee's deed shall convey all of
24 the right, title, and interest in the real and personal property sold at the trustee's
25 sale which the grantor had or had the power to convey at the time of the
26 execution of the deed of trust, and such as the grantor may have thereafter
27 acquired. **If the trustee accepts a bid, then the trustee's sale is final as of the
28 date and time of such acceptance if the trustee's deed is recorded within
fifteen days thereafter. (Emphasis added.)**

The Washington Supreme Court has considered the impact of a foreclosure sale and a
recorded Deed. *See Udall v. T.D. Escrow Svcs., Inc.*, 159 Wn. 2d. 903, 908, 154 P.3d. 882.

1 (2007). The Court held that the foreclosure trustee's acceptance of the fall of the gavel bound
2 the foreclosure trustee to the delivery subject only to procedural irregularities in the sale.

3 The recording of the TDUS falls under the "ministerial act" exception to automatic
4 stay. Ministerial acts are automatic occurrences that entail no deliberation, discretion, or
5 judicial involvement. *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000)(ministerial acts or
6 automatic occurrences that entail no deliberation, discretion, or judicial involvement do not
7 constitute violation of the stay). Arguably the execution and delivery of the TDUS after the
8 foreclosure sale are also ministerial acts that do not require any deliberation or discretion and
9 as such are not a violation of the stay. However, if the Court believes the execution and
10 delivery of the TDUS by the Trustee is not a ministerial act, good cause exists for retroactive
11 annulment of the automatic stay.

12 **C. Pursuant To 11 U.S.C. § 362(d)(1) Cause Exists for Annulment of**
13 **the Automatic Stay.**

14 Pursuant to Section 362(d)(1), Movant is entitled to relief from stay "for cause",
15 including a lack of adequate protection. 11 U.S.C. § 362(d)(1). There is no clear definition of
16 "cause" so it is left to the bankruptcy court to make a determination on a case-by-case basis.
17 *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir.
18 1990).

19 "[U]nder Washington law, the Debtor's and the estate's rights in the Property
20 following the sale, absent a challenge based on applicable procedural or other irregularities in
21 the conduct of the sale itself, are at most in the nature of bare legal title together with a
22 possessory interest, rather than full and unfettered ownership interests and rights in such
23 Property. 11 U.S.C. § 541(a)(1)." *In re Nelson*, Case No. 16-44597, 2017 WL 745595 (E. D.
24 Wash. 2/24/17). In *Nelson*, the Court found "cause" exists to grant relief from stay based on
25 the following facts. First, Movant is a bona fide purchaser that paid the \$205,000 bid price to
26 the foreclosure trustee and is 'incurring significant financing charges' to a third party lender
27 that financed such purchase price. Carl Decl. 1:21–22 and 2:8–10, ECF No. 26–1. The Debtor
28 has not provided evidence of any adequate protection of the Movant's interests in the
Property. Second, the Debtor not only failed to take any allowed statutory action under the

1 Washington DTA to cure the default or to stay the foreclosure sale prior to the Trustee's
2 acceptance of Movant's bid, but has also failed to provide any evidence of procedural or other
3 irregularities in relation to such foreclosure sale or otherwise challenge the sale through the
4 filing of any action to void such sale. Based on the Court's determination that invalidity of the
5 physical delivery of the deed, if in fact done in violation of the stay, would not void the entire
6 foreclosure sale, it is appropriate to grant the Movant relief from stay for cause."

7 In the present case, the Debtor has not provided evidence of any adequate protection of
8 Movant's interest in the Property. In fact, the Debtor has breached two loan modifications
9 offered to her, was found to have participated in bad faith in the Washington State Mediation
10 Program, failed to take any statutory action under the Washington DTA prior to the sale, filed
11 a bare bones Chapter 13 petition in bad faith after the foreclosure sale to cause further delay
12 and expense, is unemployed, and her own late filed schedules show she does not have
13 sufficient income to make the regular monthly payment on the loan, let alone anything to cure
14 the arrears due. Hence, relief should be granted and the stay should be annulled.

15 **D. Retroactive Annulment is Appropriate.**

16 Section 362(d) "gives the bankruptcy court wide latitude in crafting relief from the
17 automatic stay, including the power to grant retroactive relief from the stay." *Schwartz v.*
18 *United States (In re Schwartz)*, 954 F.2d 569, 572 (9th Cir. 1992).¹ Retroactive relief validates
19 acts which violate the automatic stay and would otherwise be void. *Id.* at 573; *Lone Star Sec.*
20 *& Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 172 (9th Cir. BAP 2005); *see also E.*
21 *Refractories Co. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998) (retroactive
22 annulment of the stay validates actions taken in contravention of such stay, whereas
23 termination, modification, and conditioning generally take effect only as of the date such
24 relief is granted). Thus, the Code accounts for the fact that it may be inappropriate in certain
25 circumstances to permit a debtor to take advantage of the automatic stay. *Oya v. Wells Fargo*
26 *(In re Oya)* BAP # SC-19-1095-BKul; 2019 WL 5390007 at *3 (9th Cir. BAP. Oct. 18, 2019)

27 ¹ Section 362(d) provides: On request of a party in interest and after notice and a hearing, the court shall grant
28 relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or
conditioning such stay[.]

1 citing *Del Conte v. Torrez (In re DelConte)*, BAP No. 06-1302-SDK, 2007 WL 7535060, at
2 *4 (9th Cir. BAP Aug. 14, 2007) citing *Sherman v. SEC (In re Sherman)*, 441 F.3d 794, 815
3 (9th Cir. 2006), opinion amended and superseded, 491 F.3d 948 (9th Cir. 2007),.

4 In deciding whether “cause” exists to retroactively annul the stay under § 362(d)(1),
5 the bankruptcy court is required to examine the circumstances of the particular case and
6 balance the equities of the creditor’s position in comparison to that of the debtor’s. *Souang v.*
7 *Fularon (In re Fularon)*, BAP No. 10-1428-JuHPa, 2011 WL 4485202, at *3 (9th Cir. BAP
8 July 11, 2011) (citing *In re Nat’l Envtl. Waste Corp.*, 129 F.3d at 1055). Under this approach,
9 the bankruptcy court considers “(1) whether the creditor was aware of the bankruptcy petition;
10 and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice
11 would result to the creditor.” *In re Nat’l Envtl. Waste Corp.*, 129 F.3d at 1055.

12 In *Fjeldsted v. Lien et al. (In re Fjeldsted)*, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003), the
13 court identified twelve additional factors that can be relevant in deciding whether retroactive
14 annulment of the stay is justified:

- 15 1. Number of filings;
- 16 2. Whether, in a repeat filing case, the circumstances indicate an intention to
17 delay and hinder creditors;
- 18 3. A weighing of the extent of prejudice to creditors or third parties if the stay
19 relief is not made retroactive, including whether harm exists to a bona fide
20 purchaser;
- 21 4. The debtor’s overall good faith (totally of circumstances test);
- 22 5. Whether creditors knew of stay but nonetheless took action; thus
23 compounding the problem;
- 24 6. Whether the debtor has complied, and is otherwise complying with the Code
25 and Rules;
- 26 7. The relative ease of restoring the parties to the status quo ante;
- 27 8. The costs of annulment to debtors and creditors;
- 28 9. How quickly creditors moved for annulment, or how quickly debtors moved
to set aside the sale or volative conduct;
10. Whether, after learning of the bankruptcy, creditors proceeded to take steps
in continued violation of the stay, or whether they moved expeditiously to
gain relief;
11. Whether annulment of the stay will cause irreparable injury to the debtor;
and
12. Whether stay relief will promote judicial economy or other efficiencies.

293 B.R. at 25. These factors, however, “are merely a framework for analysis and not a

1 scorecard,” and thus “[i]n any given case, one factor may so outweigh the others as to be
2 dispositive.” *Id.* The debtor bears the ultimate burden of proving that the request for
3 retroactive relief from the stay should be denied. *In re Fularon*, 2011 WL 4485202, at *5
4 (citing *In re Nat’l Envtl. Waste Corp.*, 191 B.R. 832, 836 (Bankr. C.D. Cal. 1996)), *aff’d*, 129
5 F.3d 1052 (9th Cir. 1997) (debtor has the burden of proof under § 362(g)(2) to demonstrate
6 that cause does not exist to annul the stay). *Id.* “[T]here is no per se rule that notice of the
7 bankruptcy case precludes retroactive relief from stay.” *Fularon* at *4.

8 In the present case, the Property was sold prior to Debtor’s bankruptcy filing to a
9 bona-fide third party purchaser. It was an unintentional error, if an error at all, that the
10 Trustee’s Deed was executed after the bankruptcy filing. Neither the creditor nor the third
11 party purchaser were aware of the post-sale bankruptcy filing. The trustee simply received an
12 email while she was on business in Florida, which did not indicate the sale date or the status
13 of the foreclosure. When the trustee returned, a staff person had prepared the TDUS and it
14 was waiting for her signature. She did not make the connection that this TDUS was related to
15 the email she received while in Florida the week before. The Property has already been sold
16 to a bona-fide third party Ladder Properties LLC who took out financing with Eastside
17 Funding LLC and is paying interest on the loan. There are surplus funds in excess of \$7,000
18 from the sale, which are not listed on the schedules.

19 The Debtor filed a bad faith bare bones bankruptcy petition. When she finally filed
20 her schedules, they proved she cannot afford to keep the house. The Debtor’s own schedule
21 show her income exceeds her debts by \$600, **without** including any mortgage or rent. The
22 only income she lists on Schedule I is \$1,945.00 in unemployment compensation. At the 341a
23 hearing she stated she did not know when that was going to run out. When the Chapter 13
24 Trustee asked her if she was looking for work, she said she had kids at home she was
25 teaching. Her Schedule J Expenses list \$1,345.00 and \$0 for rent or mortgage payment.
26 Obviously she plans to drag this out as long as she can without making a payment. The trial
27 payment plan was \$2,139.05, over three and one-half times her available income. Then there
28 is all the arrears that are owed. She doesn’t propose to make any post-petition payments. She
proposed to pay only \$416.67 for a listed \$25,000.00 in arrears, which is way understated. As

1 noted in the Loan Modification Agreement with Trial Payment Plain, if she fails to make the
2 trial payments “all terms revert back to the original mortgage” and the total amount in arrears
3 was \$66,070.83 good through 8/1/19.” It is bad faith to file a Plan, which the Debtor knows is
4 unfeasible and is simply a delay tactic, as the Debtor is unemployed.

5 There are no costs for annulment of the stay to debtors or creditors. The trustee’s
6 counsel promptly contacted debtor’s counsel when advised of the situation and promptly
7 provided him with all the documents he requested as he was trying to find a procedural defect
8 to void the sale but had not found any. Thereafter, the trustee’s attorney attempted to resolve
9 this matter numerous times via phone and email as Debtor’s counsel had stated he wanted to
10 discuss this matter, but he did not respond. He kept saying he needed more time to try to find
11 something wrong. Movant has been forced to file this motion because Debtor’s counsel has
12 failed to respond to trustee’s calls and emails.

13 The debtor failed to file all the required documents or make her payment by the 341(a)
14 hearing. Furthermore, her proposed Plan is clearly unfeasible as noted above. It would be
15 very difficult to unwind a sale at this time. Retroactive annulment of the stay will not cause
16 irreparable injury as the debtor has already been offered two loan modifications and defaulted
17 on both and then failed to participate in mediation in good faith. She cannot afford this house.
18 Debtor has taken no actions to unwind the sale other than file this bankruptcy. If Debtor truly
19 wished to reorganize this debt through a Chapter 13, she has provided no reason as to why a
20 petition was not filed prior to the sale thus preventing or at least stalling it from the outset.
21 Rather, Debtor is seeking only to further frustrate and prejudice Movant’s rights. Retroactive
22 annulment of the stay will promote judicial economy and other efficiencies as there will be no
23 need to record a new Trustee’s Deed, which would just confuse the chain of title. It will also
24 allow Movant to exit this bankruptcy and Debtor to focus on those debts that can be
reorganized.

25 **III. RELIEF REQUESTED**

26 For the reasons stated above, Movant requests:

- 27 1. An Order Terminating the Automatic Stay as to Movant, including
28 retroactive annulment of the Stay as of October 12, 2020, the date of

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execution of the Trustee’s Deed Upon Sale;

- 2. In the alternative, an Order Terminating the Automatic Stay for cause pursuant to 11 U.S.C. 362(d)(1) to allow Movant to re-execute and re-record its Trustee’s Deed Upon Sale;
- 3. That the fourteen day stay described in Bankruptcy Rule 4001(a)(3) be waived upon relief;
- 4. For such other relief as the Court deems proper.

Dated: November 12, 2020

Respectfully Submitted,
GHIDOTTI | BERGER LLP

/s/ Nancy R. Tragarz
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Owner Trustee of the Residential Credit Opportunities
Trust V-C, its successors and/or assignees